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In the

Supreme Court of the United States

OCTOBER TERM, 19....

No. 647

KING COUNTY, a legal subdivision of the State of Washington; A. J. STEEN, as County Assessor of King County, Washington, and A. A. TREMPER, as County Treasurer of King County, Washington,
Appellants,

vs.

F. L. HARTUNG GLASS COMPANY, INC., a corporation,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

JURISDICTIONAL STATEMENT FOR A WRIT OF CERTIORARI

WILLIAM L. PAUL, JR.
Deputy Prosecuting Attorney
for King County,
Attorney for Appellants.

CHARLES O. CARROLL
Prosecuting Attorney,
King County

JAMES J. CAPLINGER
Chief Civil Deputy

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In the
Supreme Court of the United States

OCTOBER TERM, 19.....

KING COUNTY, a legal subdivision of the State of Washington; A. J. STEEN, as County Assessor of King County, Washington, and A. A. TREMPER, as County Treasurer of King County, Washington, *Appellants*, vs. F. L. HARTUNG GLASS COMPANY, INC., a corporation, *Respondent*.	No. .....

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT FOR A WRIT OF CERTIORARI

STATEMENT AS TO JURISDICTION

Appellants, KING COUNTY, a legal subdivision of the State of Washington; A. J. STEEN, as County Assessor of King County, Washington, and A. A. TREMPER, as County Treasurer of King County, Washington, submit herewith their Statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Supreme Court of Washington in Cause No. 30257.

Alternatively, Appellants ask that this be regarded by the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States as

a petition for writ of Certiorari to review the final decree of the Supreme Court of the State of Washington affirming the decree of the Superior Court of King County, Washington, permanently enjoining the collection of a tax (Title 28, Sec. 2103, USC).

JURISDICTION

1. Opinions Below

The judgment of the trial court is attached hereto as Appendix No. 2. The opinion of the Supreme Court of the State of Washington is attached hereto as Appendix No. 3. It is unofficially reported at 160 Wash. Dec. 398, 374 P.(2d) 174.

2. Statutory Provisions Sustaining Jurisdiction

The statute believed to sustain the jurisdiction of the Supreme Court of the United States is § 1257 (2) of Title 28 of the United States Code as to questions 1 and 2, and § 1257 (3) as to question 3.

3. Statutes of the State Involved

The statutes of the state, the validity of which is involved, are Revised Code of Washington 84.36.005 and 84.40.220 attached as Appendix No. 1.

4. Date of Judgment and Appeal

The opinion and judgment of the Supreme Court of the State of Washington was entered August 16, 1962, and is attached hereto as Appendix No. 3. The Notice of Appeal was filed September 13, 1962.

The time within which to serve and file the printed jurisdictional statement was extended by order of November 19, 1962 (November 18, 1962, being a Sunday)

of the Washington State Supreme Court to December 18, 1962.

5. Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *Brown v. Maryland*, 25 U.S. 266 (12 Wheaton 419), 6 L.ed. 678 (1827); *Low v. Austin*, 80 U.S. 29 (13 Wallace 29), 20 L.ed. 517 (1871); *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. City of Algoma*, decided together and reported in 358 U.S. 534, 3 L.ed.(2d) 490, 79 S.Ct. 383 (1958).

6. Raising the Federal Questions

(a) Questions 1 and 2

Federal questions involving the original package doctrine, namely the effect of Article I, Section 10, Clause 2 of the United States Constitution, upon the general tax laws of the State of Washington, were raised originally in the complaint (Tr. 1) filed in the Superior Court. Revised Code of Washington 84.36.005 and 84.40.220 are the statutes under which the County Assessor made the assessment and the Treasurer levied the tax in question.

The precise language of the judgment of the trial court (Tr. 16) is in general terms insofar as the statutes and the United States Constitution are concerned:

> "That the assessment for personal property taxes levied by the Defendant, A. J. 'Tony' Steen, for the year 1960 and the tax levied thereon payable in the year 1961, so far as the same purport to assess and levy a personal property tax against property of the plaintiff herein which is imported

and which remains in its original package, be and it hereby is declared to be null and void and of no effect whatsoever."

(b) Question 3

The contention that Article I, Section 10, Clause 2 of the United States Constitution and *Brown v. Maryland, supra*, concern only an excise tax, and not a general property tax, was raised at length on oral argument before the state supreme court.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the assessment of the county general property tax on the taxpayer's goods irrevocably dedicated to general sale, authorized by Revised Code of Washington 84.36.005 and 84.40.220 was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular that Clause 2 relating to imposts and duties is controlling of ad valorem general property tax statutes of a state, to the end that RCW 84.36.005 and 84.40.220 are invalid to the extent of assessment of tax on the taxpayer's goods still in the original package.

2. Whether the assessment of the county general property tax on the taxpayer's goods irrevocably dedicated to general sale, authorized and directed by Revised Code of Washington 84.36.005 and 84.40.220 was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular that Clause 2 relating to imposts and duties is controlling of ad valorem general property tax statutes of a state

to prohibit the assessment of taxes on goods irrevocably dedicated to a use inconsistent with importation, to-wit: general sale from the general mass of state property (though still in the original package) to the end that such assessment of tax is invalid.

3. Whether the assessment of the county general property tax on the taxpayer's goods, authorized and directed by Revised Code of Washington 84.36.005 and 84.40.220, was prohibited by Article I, Section 10, Clause 2 of the United States Constitution and in particular, the Supreme Court of the State of Washington has construed Clause 2 as applicable to state and county general property taxes to prohibit the taxation of respondent's property, whereas in fact Clause 2 relates only to imposts and duties, meaning excise taxes.

STATEMENT OF THE CASE

The respondent, H. L. Hartung Glass Company, Inc., filed its action in the Superior Court of the State of Washington to enjoin the County Treasurer from collecting a portion of the general property tax on its personal property inventory. The Assessor had proceeded under RCW 84.36.005 and 84.40.220 to value all the business inventory of the respondent. The Treasurer had spread the millage rates of the state, cities, districts and the county on his books at such value, and was demanding payment of the general property tax.

The tax was on goods imported by respondent from foreign countries and domestic goods of the respondent owned and held for general resale at wholesale from its business to purchasers within this state. All of the goods of the respondent remained in their original

packages for an indefinite though short time. There was no commingling of the foreign and domestic goods of the total business inventory, assessed of $48,500.00. The trial court judgment determined that $27,702.00 was attributable to the foreign goods of the business.

Respondent's business is described in the evidence as follows (Tr. 9):

> "1. The [respondent] corporation has been in business about nine years. The nature of [respondent's] business is the general wholesaling in the State of Washington of single and double weight flat glass, crystal and flat glass plate, 60% of the inventory is imported from foreign countries and stored in the original package in the warehouse of the [respondent] in Seattle.
>
> "2. The [respondent's] warehouse is a part of the sales office and is located within the City of Seattle. Sales of the [respondent's] products are effectuated by five salesmen, soliciting sales personally and by mail from any point in the State of Washington.
>
> "3. The imported glass heretofore referred to is shipped in the same crate and in the same condition as it arrives. The crated glass stays within the warehouse only a short period of time because it is a standardized product and there is no need for an extensive inventory. The principal customers for the products sold by the [respondent] corporation are retailers and contractors who ultimately either deliver the flat glass products to the public or use the flat glass products as windows."

On cross-motions for summary judgment the trial court on October 3, 1961 (R. 16), determined in effect that RCW 84.36.005 and 84.40.220 were invalid to the

extent of that portion of the property of the respondent imported from foreign countries and still in their original packages, because such statute was repugnant to Article I, Section 10, Clause 2 of the United States Constitution. Directly speaking, the assessment was held invalid to the extent of the goods "imported and which remains in its original package."

Revised Code of Washington 84.36.005 and 84.40.220 are attached hereto as Appendix No. 1.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

(a) Local Quantity of Tax Involved Is Substantial

The taxes contested in this case total $1,786.78 for 1960, due February 15, 1961. Respondent operates an established business and the general property tax will be of similar amount each year.

The County Assessor and Treasurer are the only persons making valuations and levies of tax for the state, county, municipalities and districts in the general property tax field in King County. The spread and purpose of the millage rate appears in Appendix No. 4. Other county, municipal and district tax revenue is minuscule. The state constitution prohibits income taxes. The state has pre-empted the excise tax field, such as for sales tax, motor vehicle fuel and use taxes.

The assessed value of goods in King County as of January 1, 1960, assessed by the average inventory method, taxed in the original package imported from a foreign country, excluding goods exempt by virtue of the local "transit" statute, was $2,500,000.00; of a fair market value of about $7,500,000.00.

The fair market value of similar goods in the State of Washington was $15,000,000.00.

Six cases are pending in the Superior Court and forty tax billings are being withheld from collection administratively awaiting the outcome of this case.

(b) The National Quantity of Tax Involved Is Substantial

Historically, counties have depended almost exclusively on the general property tax for revenue and support.

Although details may vary and a modicum of exemption is given by some states of goods in transit, primarily all states use the general property tax system of the kind here involved, although not all states presently tax personal property by the ad valorem general property tax method.

Some states impose the tax generally, as Washington: "All property . . . shall be subject to assessment and taxation" and leave to the courts to construe the scope of the act as in the instant case.

California requires: "All property in this state, *not exempt under the laws of the United States* or of this state, is subject to taxation under this code." West's Annotated California Codes, Revenue and Taxation, § 201.

Oregon requires: "All real property within this state and all tangible personal property situated within this state, *except as otherwise provided by law*, shall be subject to assessment and taxation in equal and ratable proportion." 2 Oregon Revised Statutes, § 307.030. The tax incidence date is 1:00 A.M. January 1, § 308.210.

Louisiana provides: "There is hereby levied for state purposes, annual taxes amounting in the aggregate to five and one-quarter mills on the dollar of the assessed value of all property within the state *except such as is especially exempted* from taxation by law. . . ." Revised Statutes (1950) § 47:1701. The tax-incidence date is January 1. § 47:1952.

Massachusetts requires: "All property real and personal, situated in the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, *unless expressly exempt*, shall be subject to taxation." 2 Annotated Laws of Massachusetts Chapter 59, § 2. The tax-incidence date is January 1.

(*Emphasis italics* supplied to foregoing sections of Constitutions.)

(c) The Constitution and Supreme Court Decisions

The questions presented are substantial insofar as the state court's use of the constitution and this court's decisions are concerned.

Article 1, Section 10, Clause 2 reads:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

To interpret this clause the Washington Supreme Court used *Brown v. Maryland*, 25 U.S. 266 (12 Wheaton 419) 6 L.ed. 678 (1827), and *Low v. Austin*,

80 U.S. 29 (13 Wallace 29) 20 Led. 517 (1871) (Tr. 29).

1. First and Second Questions—Statutes and Assessment Valid Because "Imports" Had Entered General Mass of State Property

Low v. Austin (1871), *supra*, may be squarely in point against King County, if the business of storage[1] by "commission merchant" there is the same as business of general sale here. We quote from p. 34 of the report:

> "'. . . Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion.'"

On the other hand, if the "commission merchant" in *Low v. Austin, supra*, was merely holding in storage the champagne assessed, as p. *12* of the record seems to indicate, then the 1871 opinion of this Court should be limited to facts of "mere storage" as in *Hooven, infra*, and be inapplicable to the instant case.

We urge that a substantial question of the scope of *Brown v. Maryland, supra*, as used by *Low v. Austin, supra*, and the Washington Supreme Court, has been raised by this Court's opinion in *Youngstown Sheet &*

[1] Defendants in Error (Attorney General of California) claimed only "storage." Brief pp. 1 and 4.

Tube Co. v. Bowers, and *United States Plywood Corp. v. City of Algoma, supra*, reported at 358 U.S. 534, 3 L.Ed.(2d) 490, 79 S.Ct. 383 (1958).

In principle, *Youngstown* and *U.S. Plywood, supra*, are either inconsistent with the original package doctrine, or constitute a modification or clarification of the doctrine insofar as goods irrevocably committed to manufacturing are concerned. Such "inconsistency" had to be ignored, the Washington Supreme Court felt, until something was done about *Low v. Austin, supra*, "whatever may be our thoughts as to any fundamental inconsistency." (Tr. 22).

The gravamen of the 1958 cases appears in this Court's holding:

> Although the goods remain in their original packages "these *manufacturers* have so acted upon the imported materials as to cause them to lose their distinctive character as 'imports' by irrevocably committing them, after their importation journeys have definitely ended, *to 'use in manufacturing'*." p. 543 (emphasis supplied).

In the instant case, the analogy we urge is simply to substitute "seller" and "to use of sale in a business," so that the rule would then read: "These 'sellers' have so acted upon the imported materials as to cause them to lose their distinctive character as 'imports' by irrevocably committing them, after their journeys have definitely ended, to 'use of sale in a business.'"

This analogy was urged by Amici Curiae (Cravath, Swaine & Moore) in *Youngstown Sheet & Tube v. Bowers* and *United States Plywood v. Algoma, supra*;

although from the opposite viewpoint, namely, that the holding of *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), (Amici Curiae Brief page 7) had already announced a contrary rule by analogy.

But this Court in the 1958 opinions then specifically made clear that *Hooven* was a "mere storage" case (358 U.S. 534, 544). In the instant case we present for the first time, or at least since 1871, a factual situation of irrevocable commitment of "imports" to a general business of sale.

The analogy of inconsistency was predicted by Professor Thomas Reed Powell, 58 Harv. L.R. 858 (1945).

2. Third Question—Clause 3 Affects Excise Taxes Only, Not General Property Taxes

This question urges that the reliance given by the court on *Low v. Austin, supra*, was misplaced because *Brown v. Maryland, supra*, wherefrom the "original package doctrine" originated, concerned an excise tax. The facts are adequately characterized by Professor William W. Crosskey in his "Politics and the Constitution" (1953, University of Chicago Press), p. 311, *et seq.* as follows:

> "The case . . . was *Brown v. Maryland* [*supra*]. . . . It involved a license 'duty' of the state of Maryland, upon 'all importers of *foreign* articles or commodities' and also, as the Court apparently interpreted the statute, upon 'importers' of American products. . . . Payment of the license duty of fifty dollars was made a necessary preliminary to the initial sale of the imports. . . . The act, in this application to first sales of imported goods in their original form or package, was held by the Supreme

Court to be a violation of the Imports and Exports Clause and, also, to be repugnant to the national 'impost' law enacted by Congress, which the Court interpreted as conferring a privilege of selling the imports it covered, upon payment of the impost the act imposed. This second ground of the decision necessarily related to foreign imports only; for that was all the national impost act covered. But the Supreme Court said it supposed 'the principles' of its decision 'to apply to importations from a sister State'; and, also, *that it 'd[id] not mean to give any opinion on a tax discriminating between foreign and domestic articles.'* This last seems to indicate how the Court interpreted the Maryland act; and since only the first 'principle' of the decision was actually adequate to an opinion of the kind the Court declared it 'mean[t] to give,' the conclusion seems inevitable that the invalidity of the Maryland tax in its interstate aspect rested solely on the 'Import and Exports' Clause of the Constitution.

"In reaching these results, the Court . . . declared specifically that: '. . . a duty on imports . . . [was] not merely a duty on importation, but [was] a duty on the thing imported.' 'It [was] not . . . [if] taken in its literal sense, confined to a duty levied while the article [was] entering the country, but extend[ed] to a duty levied after it had entered the country.' This proposition was the actual basis of the Court's decision, since the tax before it was not one levied upon importation. Though remarks upon the limits of the protection afforded by the Constitution were, as the Chief Justice himself observed, 'premature' in the case, he nevertheless went on to make the suggestion . . . that, 'when the importer ha[d] *perhaps*, lost its distinctive char-

acter as an import, and [so] bec[o]me subject to the taxing power of the State.' This point, however, was not decided; but was carefully reserved for future decision, when the point should actually arise. So, all *Brown v. Maryland* settled, or was intended to settle, was that a tax of the kind before the Court, which the Court regarded as one applying to interstate as well as foreign imports, was covered. . . ."[2]

We offer the Court now the historical materials gathered by Professor Crosskey to Chapter X of his cited work (*i.e.*, Chapter 33, The Federalist) now to be offered as a legal definition of "imposts and duties" as contrasted with "general property taxes."

Although this view was advanced in *Low v. Austin, supra*, Professor Powell (58 Harv. L. R. 858, 866), points out that the argument was "literary" rather than "completely coercive" as a matter of historical legal definition.

This question was mentionad rather wistfully by the Wisconsin court in one short paragraph (*United States Plywood v. Algoma*, 2 Wisc.(2d) 567, 87 N.W.(2d) 481, 483), then apparently ignored by all counsel before this court.

CONCLUSION

For the foregoing reasons, the Supreme Court take jurisdiction of this appeal.

DATED November 26, 1962.

Respectfully submitted,

WILLIAM L. PAUL, JR.
Deputy Prosecuting Att
for King County
Attorney for App

CHARLES O. CARROLL
Prosecuting Attorney,
King County

JAMES J. CAPLINGER
Chief Civil Deputy

APPENDIX I

REVISED CODE OF WASHINGTON

§84.36.005 Property subject to taxation. All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at twelve o'clock meridian in each year, excepting such as is exempted from taxation by law.

§84.40.220 Merchant's personalty held for sale — Consignment from out of state — Nursery stock assessable as growing crops. Whoever owns, or has in his possession or subject to his control, any goods, merchandise, grain or produce of any kind, or other personal property within this state, with authority to sell the same, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from any place out of this state for the purpose of being sold at any place within the state, shall be held to be a merchant, and when he is by this title required to make out and to deliver to the assessor a statement of his other personal property, he shall state the value of such property pertaining to his business as a merchant.

APPENDIX 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

F. L. HARTUNG GLASS CO., INC., a Washington corporation, *Plaintiff*, vs. KING COUNTY, a municipal corporation; and A. J. "TONY" STEEN, as County Assessor of King County, Washington; and A. A. TREMPER, as County Treasurer of King County, Washington, *Defendants.*	No. 567097

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

This matter having come on for hearing before the undersigned Judge of the above-entitled court on the 27th day of July, 1961, and the plaintiff being represented by its attorneys, Croson, Johnson & Wheelon, and the defendants being represented by the Prosecuting Attorney for King County and his assistant, William Paul, and the matter having been heard upon the motions, respectively, of the defendants and the plaintiff for summary judgment, and the court having heard argument of counsel and the court being advised in the premises, and the court herein having denied the motion for summary judgment of the defendants herein and having granted the motion of the plaintiff herein, and the court having heretofore entered its findings of fact and conclusions of law, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the assessment for personal property taxes

levied by the defendant, A. J. "Tony" Steen, for the year 1960; and the tax levied thereon payable in the year 1961, so far as the same purport to assess and levy a personal property tax against property of the plaintiff herein which is imported and which remains in its original package, be and it hereby is declared to be null and void and of no effect whatsoever.

2. That the defendant, A. J. "Tony" Steen, as County Assessor of King County, State of Washington, be restrained and enjoined from certifying the purported assessment and levy to the County Treasurer for collection, and that he be further directed to cancel and remove said levy of assessment from the tax rolls of King County,

3. That the defendant, A. A. Fremper, as County Treasurer of King County, State of Washington, be and he hereby is restrained and enjoined from taking any proceedings, by distraint or otherwise, to enforce the collection of said purported assessment and levy for personal property taxes against the property of plaintiff referred to in Paragraph 1 hereof.

4. That the plaintiff herein recover its costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 3rd day of October, 1961.

F. A. WALTERSKIRCHEN
Judge.

APPENDIX 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TRICON, INC., a corporation, *Respondent*; vs. KING COUNTY, a legal subdivision of the State of Washington, *Appellant*.	No. 36215 En Banc
F. L. HARTUNG GLASS COMPANY, INC., a Washington corporation, *Respondent*, vs. KING COUNTY, a legal subdivision of the State of Washington; A. J. "TONY" STEEN, as County Assessor of King County, Washington, and A. A. TREMPER, as County Treasurer of King County, Washington, *Appellants*.	No. 36267

As the above entitled cases present substantially identical issues on appeal, they have been consolidated for our review.

The plaintiff Tricon, Inc., brought suit in the Superior Court for King County to obtain a refund of an ad valorem tax assessed against certain personal property of the plaintiff and paid under protest. The plaintiff F. L. Hartung Glass Company, Inc., brought suit in the same court for injunctive relief to restrain the county assessor and treasurer from collecting an ad valorem tax assessed against certain property belonging to it. In both cases, judgment was awarded for the plaintiff.

The plaintiff Tricon, Inc., is engaged in the business

of importing from foreign countries various kinds of steel products. All of these steel products are imported for the sole purpose of resale to purchasers in Washington and in other states. The products, upon which the tax here involved was assessed and paid, were imported from foreign countries and remained, until sold and delivered to purchasers, in their original bundles, reels, crates or packages in which they were received upon entry to this country.

The plaintiff F. L. Hartung Glass Company, Inc., is engaged in the business of importing from foreign countries glass products for resale to purchasers within this state. The glass products, upon arrival at the company's place of business in Seattle, are stored in its warehouse in the original packages in which they arrive upon importation and remain there in that condition until sold to purchasers.

The basis for the judgments in the trial court in favor of the plaintiffs was the prohibition contained in the United States Constitution, Art. I, § 10, which provides:

> . . .
>
> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . . "

It has been the long-standing rule since the early cases of *Brown v. Maryland*, 25 U.S. 266 (12 Wheaton 419), 6 L.Ed. 678 (1827) and *Low v. Austin*, 80 U.S. 29 (13 Wallace 29), 20 L.Ed. 517 (1871), that goods imported from foreign countries for resale to purchasers in this country retain their character as imports while they remain in their original packages and until they are sold by the importer they are not subject to state taxation either in the form of a license tax upon the right

of the importer to sell or in the form of an ad valorem tax upon the property. See also *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 77 L.Ed. 740, 53 S.Ct. 373 (1933).

The defendant King County (appellant in both cases) contends, however, that two recent cases decided by the Supreme Court of the United States, *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. City of Algoma*, decided together and reported in 358 U.S. 534, 3 L.Ed.(2d) 499, 79 S.Ct. 383 (1958), have sub silentio modified the rule of the *Brown* and *Low* cases to the extent that the taxes assessed in the instant cases are now not to be considered in violation of Art. I, § 10 of the United States Constitution and should be upheld as valid exercises of this state's taxing power.

In the *Youngstown Sheet & Tube Co.* case, the taxpayer imported iron ores for its own use in manufacturing and stored them in piles until needed in the manufacturing process. In the *United States Plywood Corp.* case, the taxpayer imported lumber and wood veneers for its own use in manufacturing and stored them in their original containers until they were ready for the manufacturing process. State ad valorem property taxes were levied upon the goods in each case. Upon review from state decisions upholding the constitutionality of the tax assessments, the United States Supreme Court affirmed the state courts and held that, although the goods were in their original containers, they had been committed to the use for which they were imported, i.e., the current inventory of the manufacturing progress, and were, therefore, subject to state taxation.

The issue here involves the interpretation and application of the federal constitution and we are bound to follow the decisions of the Supreme Court of the United States, which have passed on this issue. *B. F.*

Goodrich Co. v. State, 38 Wn.(2d) 663, 231 P.(2d) 325, (1951). It remains, therefore, for this court to determine whether the rule of the *Brown* and *Low* cases, which the appellant concedes would otherwise control the disposition of the instant cases, has been modified. We are convinced, from our reading of the decision in the *Youngstown Sheet & Tube Co.* and *United States Plywood Corp.* cases, that the Supreme Court did not intend to change the rule applicable to the instant cases.

In *Brown v. Maryland, supra*, Chief Justice Marshall set forth the underlying principle which governs the question of state tax immunity for imports:

> "... when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State:"

The Chief Justice went on to say:

> "but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

As to when the thing imported has been "so acted upon," the court in the *Youngstown Sheet & Tube Co.* and *United States Plywood Corp.* cases, *supra*, specified some of the acts that would shed the tax immunity by recognizing, with approval, language in *Brown v. Maryland, supra*:

> "... the goods lose their character as imports when the importer (1) 'sells them,' or (2) '[breaks] up his packages, and [travels] with them as an itinerant pedlar.' ... More important to the ques-

tion confronting us, he also held (3) that goods brought into this country by an importer for his own use and here used by him are to be regarded as a part of the common mass of property and are not immune from state taxation. . . ."

It is apparent from a reading of the opinion, that the issue presented by the facts was limited to an application of the rule as stated in clause (3) in the above quote. This is illustrated by the following passages from the court's opinion:

". . . The constitutional design was thereby to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all purposes of the importation definitely have ended and the materials have been put to the use for which they [were] imported. *Hooven & Allison Co. v. Evatt*, *supra* [324 U.S.], at 657, for in such a case they have lost their distinctive character as imports and are subject to taxation. . . .

". . . .

". . . Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale (*Brown v. Maryland*, *supra*; *Waring v. The Mayor*, 8 Wall. 110, 122-123; *Low v. Austin*, 13 Wall. 29, 32-33; *Cook v. Pennsylvania*, 97 U.S. 566, 573; *May v. New Orleans*, 178 U.S. 496, 501, 507-508), goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the original package, if, as found here, they have been put to the use for which they [were] imported. *Hooven & Allison Co. v. Evatt*, *supra*,

at 657. Breaking the original package is only one of the ways by which packaged goods that have been imported for use in manufacturing may lose their distinctive character as imports. Another way is by putting them to the use for which they [were] imported. . . ."

We do not think the Supreme Court has indicated by implication that goods imported for resale, and which remain in their original containers, lose their character as imports immune from state taxation when they become a part of the importer's current inventory of goods held for sale. See *Michle Printing Press & Mfg. Co. v. Department of Revenue*, 18 Ill.(2d) 445, 164 N.E.(2d) 1 (1960); *State ex rel. Morton Co. v. Board of Review*, 15 Wis.(2d) , 112 N.W.(2d) 914 (1962). Whatever may be our thoughts as to any fundamental inconsistency in distinguishing between goods imported for one's own use which become a part of current inventory in the manufacturing process and goods imported for resale which become a part of the importer's current inventory in the selling process, we are bound, as heretofore stated, to accept the rationale of the decisions of the Supreme Court of the United States.

We, therefore, hold that the tax paid under protest by Tricon, Inc., and the tax assessed against F. L. Hartung Glass Company, Inc., are invalid because they were assessed in violation of Art. I, § 10 of the United States Constitution.

The judgments of the trial court are affirmed.

APPENDIX 4

KING COUNTY GENERAL PROPERTY TA
RATE: 1961

Name of Public Body and Purpose		*Mill R*
State of Washington (Public Assistance)		3.2
King County		
Cumulative Reserve	.02435	
Current Expense	5.68875	
Airport Bonds 1950	.04477	
Airport Bonds 1952	.03332	
Emergency Warrants	.13365	
Hospital and County Warehouse	.06566	
Inter-County River Improvement	.01048	
Public Health	.47918	
Soldier's Relief	.05704	
Flood Control	.26280	
Tuberculosis Hospital	.60000	
Bond Int. and Redemption	.11000	8.4
Seattle School District No. 1		29.3
Port of Seattle (District)		3.5
City of Seattle		20.0
To be collected by County Treasurer		64.5

Office Supreme Court, U.S.
FILED
DEC 26 1962.
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 19.....

No. 647

KING COUNTY, a legal subdivision of the State of Washington; A. J. "Tony" Steen, as County Assessor of King County, Washington, and A. A. Tremper, as County Treasurer of King County, Washington,
Appellants,

v.

F. L. HARTUNG GLASS COMPANY, INC., a corporation,
Appellee/Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO DISMISS APPEAL and BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Ofell H. Johnson, of
CROSON, JOHNSON & WHEELON
900 United Pacific Building
Seattle 4, Washington

James F. Loveridge, Jr.
Herman S. Siqueland
Attorneys for Appellee/Respondent

METROPOLITAN PRESS AND WESTERN

IN THE

Supreme Court of the United States

October Term, 19

No.....

KING COUNTY, a legal subdivision of the State of Washington; A. J. "Tony" Steen, as County Assessor of King County, Washington, and A. A. Tremper, as County Treasurer of King County, Washington,

Appellants,

v.

F. L. HARTUNG GLASS COMPANY, INC., a corporation,

Appellee/Respondent.

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Ofell H. Johnson, of
CROSON, JOHNSON & WHEELON
900 United Pacific Building
Seattle 4, Washington

James F. Loveridge, Jr.
Herman S. Siqueland
Attorneys for Appellee/Respondent

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IN THE

Supreme Court of the United States

October Term, 19

No.....

KING COUNTY, a legal subdivision of the State of Washington; A. J. "Tony" Steen, as County Assessor of King County, Washington, and A. A. Tremper, as County Treasurer of King County, Washington,

Appellants,

v.

F. L. HARTUNG GLASS COMPANY, INC., a corporation,

Appellee Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEE'S MOTION TO DISMISS APPEAL

Appellee, the F. L. Hartung Glass Co., Inc., moves for an order dismissing King County's appeal from the decision of the Supreme Court of the State of Washington on the grounds that this court lacks jurisdiction to review, by appeal, the decision of that court.

In the court below, no issue as to the constitutionality of any statute, under either the Federal or Washington Constitutions, was raised or decided, but even if such an issue had been raised, the decision of the Washington Court having been in favor of the appellee's claim of

a federal constitutional immunity, this court has no jurisdiction to review the case, by appeal, under the applicable statute, 28 U.S.C. § 1257.

Ofell H. Johnson, of
CROSON, JOHNSON & WHEELON,
James F. Loveridge, Jr.,
Herman S. Siqueland,
Attorneys for Appellee Respondent.

IN THE

Supreme Court of the United States

October Term, 19

No. .....

KING COUNTY, a legal subdivision of the State of Washington; A. J. "Tony" Steen, as County Assessor of King County, Washington, and A. A. Tremper, as County Treasurer of King County, Washington,

Appellants,

v.

F. L. HARTUNG GLASS COMPANY, INC., a corporation

Appellee Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

The only question presented for review is whether those goods of the respondent which had been imported from abroad had retained their character as imports within the meaning of Article I, § 10, Clause 2 of the Federal Constitution, at the time the petitioners attempted to assess them for purpose of the state and county *ad valorem tax*. This is the question which the petitioners have designated "Question Two."

The petitioners are in error in claiming that a question concerning the constitutionality of the state taxing statutes is presented for review.

The petitioners' "Third Question," if it is in fact a separate question from "Question Two," is not presented for review because it was not properly raised in the court below.

RESTATEMENT OF THE CASE

The judgment of the trial court (Trans. 16) determined only that the assessment of the respondent's goods was invalid to the extent it included foreign imports; it did not determine, either directly or otherwise, that the statutes under which petitioners had proceeded to assess the respondent's goods were unconstitutional under Article I, § 10, Clause 2 of the Federal Constitution.

ARGUMENT

In the Exercise of Its Discretion, the Court Should Deny the Petition for Certiorari.

The respondent, an importer-wholesaler, brought this action in the state court below to establish and enforce the immunity, from state *ad valorem* taxes, of certain glass products which it had imported from abroad, basing its claim of immunity on Article I, § 10, Clause 2 of the Federal Constitution. The Washington Court decided in favor of that immunity. Thus, under 28 U.S.C., § 1257 (3) a federal question is presented which this court has jurisdiction to review, in its discretion, by certiorari. Though the court has jurisdiction, there are no special and im-

portant reasons to justify a review of the Washington Court's decision.

A. Petitioner states that the first question presented concerns the constitutionality of the state statutes under which petitioners sought to assess and tax the respondent's goods. No such question is presented by this case. The question was neither raised, discussed nor decided in the court below. Respondent's complaint (Trans. 1) alleged only that the "purported assessment" was in violation of the Federal Constitution, not that the statute under which petitioners had assessed the goods, RCW 84.36.005, was unconstitutional. The judgment of the trial court (Trans. 16), and the decision of the Washington Supreme Court (Trans. 18, and Appendix "2" of petitioner's "Jurisdictional Statement for a Writ of Certiorari") decided only that the assessments were invalid and did not pass on the constitutionality of RCW 84.36.005. The reason why the constitutionality of that statute was not in question is found in the language of the statute itself, RCW 84.36.005, which provides:

> "All property now existing, or that is hereafter created or brought into this state, shall be subject to assessment and taxation for state, county, and other taxing district purposes, upon equalized valuations thereof, fixed with reference thereto on the first day of January at 12 o'clock meridian in each year, *excepting such as is exempted from taxation by law.*" (Emphasis added).

The question which this case presented, and which the Washington Court decided was simply whether the respondent's property was "such as is exempted from taxation by law"; thus, the court's determination that it

was so exempt in no way held the above-quoted statute to be unconstitutional under Article I, § 10, Clause 2 of the Federal Constitution, or any other constitutional provision.

B. The question presented by this case—whether the assessment was valid because the respondent's imported goods in question had entered the general mass of state property—was the only question raised and decided in the court below. Restated, the question is whether goods imported from abroad for resale, and held here by the importer in the ordinary course of his business, in the original package in which imported, lose their character as imports prior to their resale by the importer. That question was decided in the negative by this court in the case of *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419) 6 L.Ed. 678 (1827), and *Low v. Austin*, 80 U.S. 29 (13 Wall 29), 20 L.Ed. 517 (1871), among others. The Washington Court held that those decisions controlled the disposition of the *instant* case and decided in favor of respondent's claim of immunity.

The *instant* case does not present any facts or combination of facts that were not presented in the *Brown* and *Low* cases. the goods involved had been imported for resale and remained in the original package in which imported; the tax involved is an *ad valorem* tax as in the *Low* case; the placing of the goods in respondent's regular inventory for sale was not more of a "dedication to sale" than the actual sale involved in the *Brown* case; the respondent's business consists of the purchase and resale of finished goods, as was the business of the individuals concerned in the *Low* and the *Brown* cases. Thus

the Washington Court did not determine a Federal question which had not previously been passed upon by this court, Rule 19 U.S. Supreme Court Rules.

The Washington Court was correct in deciding the *instant* case in accordance with the rule of the *Brown* and *Low* cases, the applicable decisions of this court. In the Washington Supreme Court, petitioners conceded that the rule of the *Brown* and *Low* cases would have been determinative of the *instant* case, but argued that the rule of those cases had been modified *sub silentio* by the decision of this court in *Youngstown Sheet and Tube Co. v. Bowers*, and *U. S. Plywood Corp. v. City of Algoma*, reported together at 358 U.S. 534, 3 L.Ed.(2d) 490, 79 S. Ct. 383 (1958).

The court, in the *Youngstown* and *U. S. Plywood* cases, did not overrule *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827), either expressly or by implication. Instead, the court fitted its decision within the doctrine announced in the *Brown* case; and expressly recognized with approval, the statement by Chief Justice Marshall of three means by which imported goods may become incorporated into the general mass of property: sale by the importer; breaking the original package in which imported; use by the importer of goods imported for his own use. The issue before the court concerned the third of those means, but appellants in the *U. S. Plywood* case argued that the fact that the goods remained in their original package determined the issue as to whether they were being used. The court held that the fact that the goods remained in their original packages was not determinative of the question of whether they

were being used by the importer: that an irrevocable commitment to use constituted a use of the goods by the importer even though the goods remained in their original, unopened package. Thus, the court emphasized the distinct character of use by the importer and breaking of the original package as means of incorporation into the general mass of property. In the light of that emphasis, and in view of the fact that sale by the importer was not there in issue, the *Youngstown* and *U. S. Plywood* decision did not reject sale by the importer as a separate and distinct means of incorporation into the general mass of property, and therefore did not overrule the *Brown* case either expressly or by implication.

In holding that the *Youngstown* and *U. S. Plywood* decision had not overruled the doctrine of the *Brown* case, the Washington court noted that the same view had been taken in *Miehle Printing Press & Mfg. Co. v. Dept. of Revenue*, 18 Ill.(2d) 445, 164 N.E.(2d) 1 (1960) and *State ex rel. Morton Co. v. Board of Review*, 15 Wisc. (2d) 330, 112 N.W.(2d) 914 (1962), all of the cases in which the question had been presented to a state court of last resort.

Petitioners urge that the decision in *Youngstown Sheet & Tube Co. v. Bowers* and *U. S. Plywood v. City of Algoma*, reported together at 358 U.S. 534 3 L.Ed(2d) 490, 79 S. Ct. 383, is inconsistent with *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827) even if it did not overrule or modify the latter case. Petitioners argue that as "irrevocable commitment to use in manufacturing" has been held to terminate the character, as imports, of goods imported for the im-

porter's use in his manufacturing process so the court, in the *instant* case, should "by analogy" hold that an irrevocable commitment to "use of sale in a business" of goods imported for re-sale terminates their character as imports. Petitioners do not urge that irrevocable commitment to "use of sale in a business" should be held to constitute a sale of those goods, therefore, what petitioners are urging is not an analogy at all. Instead, they are urging that this court now reject sale as a separate and distinct means of terminating the character of goods as imports, and redefine the meaning of "use" so as to include the act of holding goods for resale as a use of those goods which will terminate their character as imports. One cannot deny that holding goods for sale is a "use" of those goods within one possible usage of that word, but, in the light of this court's long continued recognition of "sale" and "use" as separate and distinct means by which imported goods may lose their character as imports, which recognition was made by the court in the *Youngstown* and *U. S. Plywood* cases, it cannot be denied that this court has never employed the word "use" in the sense that petitioners now urge.

The adoption by this court of the redefinition of the word "use," urged by petitioners, would require that *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419); 6 L.Ed. 678 (1827) be completely overruled. Any dedication of goods to sale would have to precede the sale itself, and all goods sold have been dedicated to sale; therefore, if dedication to sale (or to "use of sale in a business") terminates the character of goods as imports, then all imported goods sold by an importer would have

lost their character as imports prior to their sale. When imported goods have lost their character as imports, they are subject to state taxation, and the extent and character of state taxation is a matter of legislative discretion; therefore, if all imported goods have lost their character as imports prior to their sale by the importer, then Article I, § 10, Clause 2, of the Federal Constitution would not prevent a state from requiring that importers obtain a license prior to selling any imported goods. That conclusion follows of necessity from the position urged by petitioners, yet the conclusion is directly contrary to the actual holding in the *Brown* case; therefore, this court could not adopt the proposition urged by petitioners without now overruling the *Brown* case.

C. If the third question which petitioners state is presented by this case is actually a separate question from the second one, then this court should refuse to consider that third question because it was not properly raised in the state court. On page four of their "Jurisdictional Statement for a Writ of Certiorari," petitioners claim only that the third question was raised on oral argument before the Washington Supreme Court. The opinion below neither mentioned nor decided that question. The rule is that unless it appears from the record brought up for review that the State Court was properly presented with the constitutional question, or at least considered it in reaching its decision, this court is without jurisdiction to review that question. *Bailey v. Anderson*, 326 U.S. 203, 90 L.Ed. 3, 66 S.Ct. 66 (1945).

Even if the third question had been presented to, or considered by the Washington Court, that court could

not have reached any decision other than that which it made, because the third question had previously been decided by this court against petitioners' contention. Article I, § 10, Clause 2, of the Federal Constitution is a prohibition on the power of the states to tax, not merely a regulation as to use of particular forms of taxes.

In *Brown v. Maryland*, 25 U.S. 419 (12 Wheat. 419), 6 L.Ed. 678 (1827), the court construed Article I, § 10, Clause 2 as denying to the states the power to tax imports. This construction has been consistently followed by this court, is an essential premise of the holding in every case which the court has decided under the Import-Export Clause, and has never been questioned by any decision of this court. In *Low v. Austin*, 80 U.S. 29 (13 Wall. 29), 20 Ed. 517, this court specifically followed that construction and held that an *ad valorem* tax on imports was prohibited. Thus, the third question posed by petitioners has long been definitely settled by the decisions of this court; therefore, it is not of the general character of questions for which review by certiorari will be granted. Rule 19, Supreme Court Rules.

CONCLUSION

The court should deny the petition for a Writ of Certiorari on the ground that no special and important reasons are presented which would justify review by certiorari.

DATED December 12, 1962.

Respectfully submitted,

Ofell H. Johnson
of CROSON, JOHNSON & WHEELON,
James F. Loveridge, Jr.,
Herman S. Siqueland
Attorneys for Appellee Respondent